

**TENANTS IN ARREARS:
A NEW ROLE FOR THE SHERIFF COURT?***

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Introduction

The biggest single change introduced by the Tenants' Rights, Etc. (Scotland) Act 1980 (in this article abbreviated to the Tenants' Rights Act or the 1980 Act) was the creation of the public sector secure tenancy. This was used to introduce that package of rights, known as the Tenants' Charter, including the right to a written lease, to sub-let or take in lodgers, to carry out repairs, alterations and improvements and, above all, the right to purchase from the landlord authority. These rights, which are similar to those granted to public sector tenants in England and Wales by the Housing Act 1980, apply to all secure tenancies. At their core is security of tenure itself, the grant to the public sector of rights parallel to those enjoyed for many years in the private sector under the Rent Acts. The essence of this

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security is the protection given to tenants by the limits imposed upon the grounds available to the landlord for recovery of possession. This has been very important for private sector tenants and, despite the misgivings of many in local government, the same benefits have now been extended to the public sector. The local authority argument had always been that they could be trusted to use their powers as landlords reasonably and that such powers were needed in order to ensure satisfactory housing management.⁽¹⁾

Whatever the strength of the arguments on each side of this issue, the introduction of public sector security may not in one respect be of enormous practical significance. A court order was always necessary before a local authority's notice to quit could be enforced and local authorities were not, in any event, in the habit of wholesale ejection of tenants. The only circumstance in which local authorities did raise very large numbers of actions against tenants was in the case of tenants with rent arrears.⁽²⁾ Since arrears with the payment of rent remains a ground for possession under the 1980 Act, no fundamental challenge has been made to the powers of landlord authorities.

Three changes were, however, introduced. In the first place, section 14 of the Act introduced a procedure which required that before proceedings could be taken against a tenant, notice in a new statutory form had to be served. This replaces the old notice to quit. Thereafter, proceedings continue to be by way of summary cause in the sheriff court. The second change is that, in addition to the need to establish that arrears of rent are owed, it must appear to the court that it is "reasonable" for an order for recovery of possession to be made. Even before the court makes a final decision on the case, and this is the third change, the court may "as it thinks fit, adjourn proceedings... for a period or periods, with or without imposing conditions as to a payment of outstanding rent or other conditions". This power to adjourn proceedings is contained in section 15(1) of the 1980 Act and replicates an equivalent power available to the court in private sector proceedings. It was the use made of this power to adjourn which provided the main focus of a research project we have recently completed for the Scottish Development Department.⁽³⁾

It had been thought that the insertion of this new power to adjourn might be important in two ways. In the first place, it could create a new role for the sheriff court. The court would no longer be confined to a process of merely "rubber-stamping" the landlord's application followed by the automatic issue of decree of ejection. Instead the court would be able to play a more active role by withholding the award of decree in appropriate cases and becoming involved in a process of mediation between the

landlord and tenant to decide the terms and conditions upon which a tenancy would continue – at least for a time.

The second way in which this power might prove important is that if the issue of decrees was no longer automatic, housing authorities might face delays and difficulties and pressure might be put upon them to work out a different relationship with defaulting tenants. It would still be one underpinned by the ultimate sanction of dispossession authorised by the court but one in which a more "managerial" approach to the problem of rent arrears might develop.

These two possible developments are, of course, related. Both are concerned with the long-standing question of how to handle rent arrears, with the causes of rent arrears, with preventative action which may be taken and with measures which are appropriate once arrears have accumulated. Recent official thinking has been that preventative rather than curative measures are to be preferred and that court proceedings are not the most rational response to the arrears problem.⁽⁴⁾

An initial suspicion that the most significant fact about section 15(1) in the first two years after its introduction in October 1980 was that it was not actually being used prompted the commissioning of the research. An early impression had developed that it was perhaps only in the Edinburgh sheriff court that sheriffs were adjourning proceedings at all and one important question was, therefore, to discover systematically whether this was the case. We were also concerned to find out the effects, if any, of the use of adjournment in any court that used the power upon tenant, landlord and court. Assuming different levels of use of the power to adjourn, we also wanted to explain why some courts had and others had not resorted to it. Beyond that, the research enabled us to speculate more widely upon the policy implications of this legislative attempt to introduce the courts into a process in which they had not previously played a strong role.

What we did was to select ten sheriff courts in different parts of the country and the eighteen housing authorities (fifteen local authorities, two new town corporations and the SSHA) in the areas covered by those courts.⁽⁵⁾ There were then four parts to the research. Firstly, for a period in 1982, we took directly from the court records the number of public sector actions for recovery of possession which had been raised together with details of the parties, whether or not the tenant was present or represented in court and the outcome.⁽⁶⁾ If, in any instance, the outcome was not final, i.e. if there had been an adjournment or some other continuation of the proceedings, we traced subsequent "callings" in the case to discover the

final decision of the court.⁽⁷⁾ Secondly, and this time from the housing authorities, we sought statistics on the number of tenancies they had, the number of notices of proceedings they had issued in a year, the number of actions actually raised and the eventual number of evictions carried out. We were able to compare these figures with directly equivalent figures collected from all Scottish housing authorities in 1978.⁽⁸⁾ These two exercises were to provide us with a substantial amount of hard data about actual practice in 1982 in both courts and housing authorities. To enable us to gather further information and to interpret these initial statistical findings, we also, thirdly, conducted interviews with sheriffs and sheriff clerks and, fourthly, with those housing officials most directly concerned with the collection of rent arrears in their authorities.

The use by sheriff courts of their power to adjourn under section 15(1)

The primary result of the research was to confirm previous suspicions and to establish that it was indeed the case that in the spring of 1982 (eighteen months after the Act came into effect in October 1980) very little use was being made in the courts of the power to adjourn proceedings for recovery of possession. Over half (54%) of the cases in our sample of 948 court actions were disposed of at the first calling by the grant of an immediate decree of ejection. The remaining actions were disposed of by decree for expenses only (the principal sum having been settled) (18%) or by dismissal (the outstanding debt having been settled in full) (10%). A further 10% of cases were continued for technical reasons. In only 5% of all cases were proceedings adjourned under section 15(1) of the 1980 Act. Not only was the number of cases adjourned very small but all were confined to one court – the Edinburgh sheriff court. In the spring of 1982, no other court in our sample of ten courts was making any use at all of the power to adjourn.

This finding must, however, be qualified in two ways. In the first place, subsequent interviews showed that a pattern of adjournments had become established in the Glasgow sheriff court by mid-1983. It is possible that the position had changed in other courts too. The other qualification which should be mentioned is that whilst adjournments under section 15(1) were infrequent and confined to one court, there were in some other courts alternative devices used to achieve a deferred outcome of a related sort. In the Airdrie court, for instance, there was quite substantial use of the “continuation *sine die*” according to which, on the pursuer’s motion, the action would be held in abeyance pending satisfactory rates of payment of arrears negotiated between the pursuer landlord and the tenant.⁽⁹⁾

Attendance as a pre-condition of adjournment

Why was it that in the Edinburgh court, and later in the Glasgow court as well, the power of adjournment was being used whereas, in the other courts, it lay dormant? By the summer of 1983 the Edinburgh and Glasgow courts had become quite unlike the others. The answer, revealed initially in the court records we examined and subsequently in interviews with sheriffs in the two courts, lies in the very close relationship between the number of tenants who attended or were represented in court and the number of adjournments which were granted. Attendance at court did not imply any high degree of forensic sophistication. All that was required to obtain an adjournment in the Edinburgh or Glasgow court was that the tenant (or his/her representative) was physically present to request an adjournment rather than immediate ejection and made an offer acceptable to the authority which would then be ratified by the court. Periods of adjournment were typically for six weeks. Representation of tenants in these two courts was only rarely by a solicitor. Much more usually it was by a spouse, close relative, social worker, councillor, or representative of an organisation such as Shelter.

Another difference which had emerged in the Edinburgh and Glasgow courts was that a sheriff rather than the sheriff clerk or his depute presided. Under the Sheriff Court Summary Cause Rules it is permissible for sheriff clerks to sit and, before the 1980 Act, this had been the usual practice in possession cases.⁽¹⁰⁾ Since the court had virtually no discretion to deny authorities their remedy, the role of the court had become wholly appropriate for delegation to the sheriff clerk. In the majority of courts we looked at this practice had continued. In the absence of tenants as defenders, the grant of decree continued to be almost automatic. Some courts occupied a half-way position in that the sheriff, rather than the sheriff clerk, did sit but business continued to be almost entirely uncontested and interventions by the sheriff were extremely rare. (In one court, in anticipation of changes which the 1980 Act was expected to bring about, the sheriff replaced the sheriff clerk on the bench but, after a few months during which no change took place, the sheriff once again gave way to the sheriff clerk.) Another half-way position was taken up in a court where the sheriff clerk continued to sit but was himself presiding over a court in which increasing numbers of tenants were beginning to turn up (“it takes a while for the punters to realise there is something in it for them”), some negotiation between the housing authority and tenants took place in court and any difficult cases were referred to the sheriff.⁽¹¹⁾ Otherwise, however, the picture was one of great contrast between that majority of courts in which very few tenants turned up and it mattered little if they did

so, the sheriff clerk continued to sit and business remained "as usual" and, on the other hand, the Edinburgh and Glasgow courts in which the sheriff sat, large numbers of tenants appeared nearly all of whom were granted adjournments as a matter of routine at the first calling and many of whom reappeared to be granted further adjournments at second (and subsequent) callings. In these two courts at least the impact of section 15(1) was being quite sharply felt.

How to produce a greater use of the powers of the court

The passing of the 1980 Act was insufficient to ensure its implementation. Insofar as the Act authorised courts to adjourn proceedings, it was merely permissive in character. It did not impose a statutory duty upon courts to adjourn or even to consider adjournment *ex proprio motu*. Furthermore courts enjoy an independence and a distance from government which makes them immune from executive encouragement or persuasion. We were told that courts do not receive guidance from, for instance, the Scottish Courts Administration on the mode of implementation of a new Act. Moreover, it was clear that the Scottish Development Department could not issue a circular, as it might to local authorities, inviting from the courts the response which, in policy terms, it might wish to see. Thus, the initiative for any change in court behaviour has to come in adversarial proceedings from one or other of the parties themselves. Courts are necessarily reactive rather than proactive agents of change. Even if there were a positive desire by sheriffs to become involved in the adjournment procedure under the 1980 Act, even if courts themselves wished to shed the old image of the rubber stamp (and we did hear support for this in many courts outside Edinburgh and Glasgow) it would still be necessary for one of the parties to the proceedings to invite the court's participation.

The pursuers, i.e. the housing authorities, would have little incentive to persuade the hitherto passive courts to adopt a more active stance – it is extremely unlikely that any housing authority would invite upon itself the additional trouble involved. That is not to say that housing authority personnel could see no advantage at all in the participation of courts in the collection of rent arrears. Most housing authorities did recognise that the threat of eviction was a serious matter and one which should be controlled by a court. Thus, we were told of the need for the court to ensure fair play and to provide a form of back-stop protection against the possibility of utterly arbitrary behaviour by a housing authority. But, by and large, they had clearly been satisfied with the role of the court prior to the passing of the 1980 Act.

Housing authorities have considerable experience of dealing with tenants in arrears. Realistically, what they are looking for is an accommodation between themselves and their defaulting tenants under which the tenants, following negotiations, will aim to pay off debts by instalments over a relatively long period. They are aware that immediate payment of substantial arrears is usually impossible. They know that eviction itself does not ensure payment nor, in most cases, is it a politically acceptable option. But the threat of eviction held out by an authority holding a decree issued by a court is generally regarded as the necessary back-drop to serious negotiation with tenants. It is widely believed that such a decree forces new priorities upon tenants regarding the payment of different debts to the advantage of the landlord authority. In the case of one housing authority only, we did come across a positive welcome for the practice of tenants appearing in court on the grounds that tenants are so much "in awe of the sheriff" that agreements reached in court and backed up by an adjournment are more likely to stick than attempts to reach an agreement out of court under threat of eviction. It would have been interesting to see whether tenants regarded appearance in court in the same light. For the most part, however, authorities saw negotiation between themselves and their tenants as something to be carried on in private with a decree or threat of a decree in the background. They could see no advantage in further participation by the court nor in the tenants' attendance at court. Half the authorities (nine out of eighteen) said that they thought tenant attendance was a bad idea and that they discouraged it.

If, therefore, there is to be a request for an adjournment under section 15(1) it is clear that this calls for an initiative by or on behalf of the tenant and the presence or representation of the tenant in court. Logic supports our empirical finding that courts will grant adjournments only when tenants are present and ask for them. Thus the principal reason for the slow and patchy implementation of the 1980 Act is that nothing was done to encourage tenants to appear in person and for this the government must, as author of the reform, accept the main responsibility. In fact, the Act created a participatory vacuum which has only been filled in rather special circumstances, for example, where there was already a tradition of attendance in the heritable property court (Edinburgh is the case in point) or where pressure from tenants could be generated with the assistance of pressure groups like Shelter, rights agencies like the Castlemilk Law Centre, community associations and sympathetic social workers and councillors (as has occurred in both Edinburgh and Glasgow). Could it have been otherwise? We believe it could have been and that if the government had given greater encouragement to tenants participation in

the new procedures, a different result would have been achieved. Given the antipathy of most authorities towards legislation which they quite reasonably viewed as likely to make life more difficult for themselves, it was not to be expected, initially at least, that they would use their own initiative to encourage tenants to appear in court. However, the government could have prepared a clear statement of the tenant's right to security of tenure which positively encouraged tenants who were subject to court action to go to court and could have required housing authorities to serve this on the tenant together with the (highly formal and therefore largely incomprehensible) notice of proceedings and (subsequently) with the summons to appear in court. The problem is not a new one and has been successfully overcome in other contexts.⁽¹²⁾ Without such encouragement, it is unlikely that attendance will ever become the norm in those parts of the country where pressure group activity is not sufficient to mobilise housing authority tenants.

This interpretation quite deliberately places great weight upon attendance by tenants in court as the principal key to the analysis of differential use by courts of their powers to adjourn. This, in turn, becomes the key to understanding court behaviour and attitudes more generally. There appears to be a very close relationship between attendance by tenants in court and not only the use of adjournment but also the appreciation by courts of a stronger more interventionist role. Although there may be other routes to a changed function for the court (perhaps including legislative intervention to ensure that the sheriff himself conducts proceedings) increased attendance by tenants would be the most important single catalyst.

The role of the courts in relation to rent arrears and evictions

If the course were to be adopted of promoting increased attendance by tenants in court and thus, we argue, increased use by courts of their own power of adjournment, this would be upon the assumption that such a development would be in the best interests of housing policy in this area. Is this necessarily the case? Are the particular characteristics of private sector security which were taken off the statutory peg to be used in the public sector directly transferable in this way? Is there any reason to believe that a stronger, more interventionist role for the sheriff court is the best way forward?

If we were to take the sole purpose of the moves towards public sector security in the 1980 Act to be either simply a sop to public housing as a counterbalance to the right to buy or, on the other hand, a symbolic grant of

a Charter with "rights" and "security" as merely pieces of propaganda, then the actual effectiveness of provisions such as section 15 of the Act would not be very important. The desired result will have been achieved simply by putting public sector security on the statute book.

Again, if the aim of creating a role for the courts was solely that of making life so much more difficult for housing authorities that they would be forced to adopt more managerial, more preventative procedures for dealing with the problem of rent arrears, then this would seem to be a rather cumbersome and indirect way of achieving that purpose. In any case, if this objective had been paramount, the government could have reissued Circular 2/1974⁽¹³⁾ or launched some other initiative to promote "good practice". Only five of the eighteen authorities in our study claimed that they had altered their procedures as a result of the Act. In each case, this appears to have resulted in a greater emphasis on early intervention and the adoption of a more managerial approach to the problem of rent arrears. The five authorities concerned included two where changes in policy were introduced at least partly in response to changes in the practice of the courts; and three where policy was changed independently of the courts. Thus, some housing authorities reviewed their policies without being provoked into doing so by changes in the practice of the courts. The five authorities did not include two authorities which raised actions in courts which had started to grant large numbers of adjournments. Clearly, changes in the practice of the courts did not necessarily give rise to changes in the housing authorities' procedures for dealing with tenants in arrears. Political ideology,⁽¹⁴⁾ professional inclination and commitment and the human, machine and cash resources available would appear to be much stronger determinants of a housing authority's approach. Most authorities are committed to some degree of preventative action on arrears although the emphasis they place on preventative policies as against court action varies a great deal.

On the other hand, the main point may have been to involve the sheriff court more strongly not simply to create greater problems for housing authorities and thereby to encourage them to a more preventative approach to arrears management, but because a stronger role for the courts would have a positive utility of its own. Looking at experience so far presents obvious difficulties and limitations. The main one is that, with only two courts using the Act, we can look only to the practice of those courts and the experience of the authorities using them. Moreover, we are still very much in the early days of the Act and full development of its use (if, indeed, that has yet been achieved) has been delayed even in the Edinburgh court and, to a much greater extent, in the Glasgow court. This brevity of

experience is extremely important because there is every reason to believe that the full consequences of introducing successive adjournments of proceedings against tenants will be cumulative in their effect. Instead of tenants' cases being called and disposed of finally within seconds they may now be called on two, three, four or more occasions each demanding more time of the court. One feature of the Edinburgh court, in sharp contrast with those courts where adjournments are not being ordered, is that court sittings devoted to public sector heritable property cases have doubled.

This additional cost in time and resources to the court system is not, however, the most important consideration. The principal question is whether policy advantages are accruing. Here again we run into difficulties due to the limited experience of adjournments and also, in our own case, problems we encountered with our research. We should have liked to have been able to examine, for example, whether levels of rent arrears in the authorities we examined had been affected by the introduction of the 1980 Act or differentially affected according to the court area in which authorities operated. It may be that this sort of calculation will, in time, become a possibility but, for us, there was only an unreliably short period available and severe methodological difficulties in isolating the new procedures under the Tenants' Rights Act from other significant variables, such as increases in unemployment and the introduction of housing benefit. The other possibility would have been to follow through individual case studies of tenants subject to court proceedings to try to ascertain the effects of successive court hearings and to compare the effects on their arrears of adjournments and decrees. This is something we had hoped to examine but housing authorities were unable to provide us with the necessary follow-up information. Thus, there is really no way of saying what has been the impact on rent arrears of the adoption by the Edinburgh and Glasgow courts of new procedures as compared and contrasted with the operation of "traditional" procedures in other courts. However, we were led to believe that, in Edinburgh, in many cases where successive adjournments had been granted followed by an apparently successful sist of proceedings (i.e. a long-term suspension of the case), the sist had eventually been recalled and a decree of ejection granted. If this occurred on a substantial scale the overall effect of adjournments may have been simply to delay for some months the order that would otherwise have been granted very much earlier. As we have said, eviction is only very rarely carried out, but if a delayed decree is all that has been achieved, a question mark must surely be placed over the whole exercise.

Other questions are being asked in the courts themselves. Even though we found that sheriffs in both Edinburgh and Glasgow recognised the

importance to tenants and their families of arrears proceedings and considered that they as sheriffs had an important role to play in them, they nevertheless expressed doubts about the task which was required of them. Sheriffs are "generalists" in that they move on a rota system between criminal work and civil work including the summary cause court. They are, therefore, not able to develop any particular specialist experience of rent arrears or related issues but are exposed to them when their turn comes round. There is some unhappiness in this role. We were told that arrears work was "not really judicial business". Sheriffs are there in a sense to protect tenants but as a result of being there get involved in a process of "horse trading" for which they have little liking. Asked about the grant of eviction decrees, they saw with regret that decree was inevitable if the tenant did not appear and the housing authority did not withdraw. They lack an inquisitorial role. It seemed clear that, although this did not come over very strongly from the sheriffs themselves, they were not operating in a court fully equipped to assess the appropriateness of payment terms which might be imposed upon tenants when adjournments are granted. An "agreement" reached in court between pursuer and defender would almost always be acceptable. Asked about the (very rare) event of the "reasonableness" of an eviction being questioned in court, one sheriff told us of his regret about the lack of any clear statutory guidelines. Reasonableness is nowhere defined and the interpretation of this term therefore depended upon the personal views of the sheriff concerned. If there were twelve sheriffs, then twelve different interpretations of reasonableness and thus twelve different social policies could be applied.

It was clear that this and other issues had been discussed informally between sheriffs but judicial individuality of approach nonetheless was paramount. There was a wish to establish a practical day-to-day response to questions of adjournment and eviction rather than to develop a clear policy collectively held. We had a strong feeling of a storm being weathered by the courts before a new and hopefully less burdensome solution emerges.

Improvements to existing procedures

Experience in the courts so far is only one guide towards appropriate future change. We are bound to ask more theoretical questions about what the role of the courts in relation to rent arrears should be. Even to attempt to discuss this issue presents difficulties – but at the same time considerable fascination! Essentially they are the difficulties of defining and isolating the "problem" of rent arrears and then of identifying appropriate solutions. The problem of what to do about rent arrears is inextricably linked with questions about rent, rent rebates, wider relationships between public

landlords and their tenants, and public sector housing itself. It is related to general questions of debt and its remedies which extend much wider than rent alone. It is part of the problem of economic recession and the systemic debt that goes with it.

It is also important to distinguish between rent arrears as an individual problem to be solved or mediated on a case-by-case basis and as a mass problem which demands across-the-board solutions. Steps taken to solve the one may contribute not at all to the other. More specifically, attempts to achieve individual justice between a landlord and a tenant may bear little relationship to mass justice between landlords as a whole and tenants as a whole. Such considerations bring us closer to questions concerning the role of the courts. It is essential that before one invokes the aid of the sheriff court (or, indeed, any court or tribunal) to take on a specific task in a world full of complex relationships and before one attempts to monitor the "success" of that court, one must have some clear understanding of what is being demanded of it. Only then does it become possible to discuss who should constitute the court – whether they should have legal or other skills; whether it should be a court (such as the sheriff court) of general jurisdiction or one confined to but specialised in other housing issues; what powers it should have; whether it should be restricted to legal or jurisdictional review; or whether, on the other hand, it should have wider powers to consider and apply principles of housing policy and practice.

Important as these questions are, they range much too wide for consideration in the present context. We mention them here simply to indicate that, in focussing now on issues of a narrower compass, we do so in the knowledge that the broader questions remain. We assume for present purposes that substantially the same legal relationships between public sector landlords and their tenants will continue; that rent will be demanded; that rent arrears will accumulate; and that recovery of possession as a final sanction on the authority of a court (or tribunal) will remain.

This having been said, we think it is helpful to approach the question of the role of the courts in relation to arrears and evictions through a comparison with the role of the courts in relation to divorce. In a seminal article entitled "Bargaining in the Shadow of the Law",⁽¹⁵⁾ Robert Mnookin and Lewis Kornhauser argued for a new way of thinking about the role of the law at the time of divorce. Instead of imposing solutions from above, they argued that the primary function of contemporary divorce law should be to provide a framework for divorcing couples to determine for themselves the distribution of rights and responsibilities after the dissolution of their marriage. This process, by which the parties would be

empowered to create their own legally enforceable commitments, was referred to as "private ordering". According to Mnookin and Kornhauser, spouses should be encouraged to negotiate with each other on the understanding that, if they failed to reach an agreement, the court would impose its own resolution which might be less favourable to either or both parties. Thus the function of law is only partly to adjudicate when the parties are unable to agree, but also, and perhaps more importantly, to provide the framework in which the parties can themselves reach agreement. In the light of this model we wish to consider the following questions. First, does section 15(1) facilitate a private ordering in which the housing authority and the tenant can "bargain in the shadow of the law" and reach an agreement (which is subsequently ratified by the court) to pay arrears by instalments; secondly, is this the right role for the courts and, thirdly, if not, what is the right role?

One assumption of Mnookin and Kornhauser's argument is that private ordering would take place outside the courtroom and that the parties would not go to court until they have reached an agreement with each other and are ready to have this "rubber stamped" or unless they are unable to do so. These assumptions clearly do not apply to rent arrears cases since, in the two courts where tenants appeared and the statutory provisions of the Tenants' Rights Act were being implemented, most offers to pay were made and accepted (or not) in the court itself. Indeed, once the summons had been served, at least one housing authority refused to accept offers by tenants to pay in instalments unless these were made in court. However, our interviews with sheriffs and housing officials, as well as observation in those courts which made regular use of section 15(1) powers to grant adjournments, did suggest that the parties seemed to understand the likely limit on payments which would be acceptable to the court, and made their offers with this in mind. Thus, most (but not all) offers were accepted. A further assumption is that the parties should have a good deal of information about each other but this was clearly not the case. The housing authority may know something about the tenant's income and household circumstances but its representatives in court are unlikely to know very much about the tenant's outgoings or general state of indebtedness or about salient details of the tenant's domestic situation. In any case, at first calling, whoever presides over the court is unlikely to know anything about the tenant. At second and subsequent callings, the tenant may be asked to explain why he or she has not been able to keep to the terms and conditions previously agreed upon but such information as is elicited is likely to be incomplete and unsubstantiated. Moreover, the court is likely to be ignorant about the policies and procedures of the housing authority or its dealings with the tenant. All this would not matter if the two

two parties were roughly equally matched but this is obviously not the case. Neither would it matter if they were equally able to act in their own best interests but this is clearly not the case either. Housing authorities have all the advantages of the "repeat player" (they know the ropes and are able to play the situation to further their interests) while the tenants have all the disadvantages of the "one-shotter" (and regularly lose out on the grounds of their inexperience).⁽¹⁶⁾

For private ordering to offer a more attractive "solution" to the problem of rent arrears, the law would have to provide a more fully elaborated legal framework in terms of which the parties could seek to reach agreement. In particular, it would need to provide guidelines for the payment of arrears by instalments and give some indication of what the concept of "reasonableness" as applied to the grant of a decree of ejection is supposed to mean. Since what is meant by "reasonableness" in this context is a question of social policy, its meaning would have to be spelled out in the legislation and not simply left for each sheriff to decide in his/her own way. However, even with these innovations, it is not clear that the law would be able adequately to protect the public sector tenant.

The fact that the two parties (public sector tenants and housing authorities) are so unequal, and that public housing authorities cannot necessarily be trusted to protect the interests of their tenants provided a very powerful justification for legal intervention and effectively distinguishes disputes between public sector landlords and tenants from those between husbands and wives. Mnookin and Kornhauser's argument that spouses should be allowed to make mistakes because, on balance, they are more likely than judges to know what is best for themselves and because, on the whole, they will make fewer mistakes, may be quite plausible but the analogous argument simply does not hold in relation to public sector landlords and tenants. Thus the court must be able to intervene and impose its judgement on the parties even when they agree, if that agreement runs counter to the interests of either party. (It is to be expected that the court would intervene most often to protect the interests of the tenant but it might also, on occasion, need to intervene to protect the interests of the public authority and the general public, e.g. where the authority has clearly accepted a much lower level of payment than the tenant can afford.)⁽¹⁷⁾ For this to be possible, the court (and not just the housing authority) would require tenants to provide details of their financial and personal circumstances, and housing authorities to provide information about their policies and procedures in relation to rent arrears and their attempts to contact the tenant. This would, of course, represent a considerable departure from current practice and make considerable

demands on the time and resources of the courts but, in our view, such innovations are necessary if the courts are to play an effective role in encouraging housing authorities to adopt preventative measures, and to seek a balance between the interests of the individual tenant and the public authority.

Alternatives to existing procedures

In the previous section we proposed a number of innovations to the existing (summary cause) procedure which were intended to make that procedure more effective. In this final section, we refer very briefly to some alternatives to this procedure. In theory, they could take three forms: administrative hearings, similar to Aberdeen's Arrears Sub Committee⁽¹⁸⁾ and strongly advocated by one of the housing officials we interviewed; a specialist tribunal or panel dealing with rent arrears and related matters suggested to us by two housing officials, and a specialist housing court. Of these three proposals, administrative hearings attended by representatives of the housing department and, if possible, by representatives of other agencies, e.g. social work departments and the DHSS, could be well placed to investigate the causes of the tenant's financial problems, give advice and negotiate payment by instalments but, because they would be inside rather than outside the authority, they could not provide an effective safeguard for tenants or subject the housing authority to critical scrutiny. A specialist tribunal or panel would presumably be rather less formal than a court and, as such, it might encourage more tenants to attend. Apart from this, the main differences between a specialist tribunal or panel dealing with rent arrears and related matters and a specialist housing court are in terms of the breadth of jurisdiction and the standing of the associated personnel. A housing court would be presided over by a housing judge and he/she and the other officials would be expected over time to become proficient in all matters relating to housing. Although this is a somewhat radical proposal which is unlikely to meet with immediate approval, proposals for a housing court were put forward as long ago as 1937 and are widely supported by organisations representing landlords as well as tenants. Moreover the case for a housing court (in England and Wales) was recently accepted by the House of Commons Select Committee on the Environment in its report on the private rented sector.⁽¹⁹⁾ Our own view is that such a court might provide an ideal environment for an independent body to carry out the sorts of tasks outlined above but that a specialist tribunal or panel could be equally effective.

It would clearly be premature to make concrete proposals for institutional change in one direction or another. On the other hand, we are

left with the strong feeling – surely incontestable in the light of our findings – that the procedures initially established by the 1980 Act have been far from successful. We further feel, however, that, although adaptation of the present system may hold out some hope for improvement, the limitations inherent in the adversarial, generalist and yet jurisdictionally confined sheriff court are too great.⁽²⁰⁾ The transplant of this aspect of the institutions of private sector security into the public sector is unlikely ever to be entirely successful. We, therefore, feel certain that a *prima facie* case for much more substantial change has been made. However, the case for such a change would have to be based upon research across fields much wider than our own. Nevertheless, our present hunch is that the time of the specialist housing tribunal or court will surely come.

References

1. The 1977 Green Paper (the Labour Government's consultative document on housing in Scotland) noted that public sector housing authorities took the view that "as responsible public bodies, they should not be inhibited in carrying out their management functions, particularly where difficult tenants are involved, that they in practice do secure evictions on the same grounds as private landlords, and that statutory security is unnecessary if they are to have a statutory responsibility to house the homeless". See *Scottish Housing : a Consultative Document*, Cmnd 6852, HMSO, 1977, para.9.21
2. In 1977/78, the last time a complete count was taken, there were 33,568 actions for recovery of possession of heritable property (including 6,550 joint actions for recovery and payment); 25,480 decrees were obtained; and 1,053 evictions carried out. See Diana Wilkinson, *Rent Arrears in Public Authority Housing in Scotland*, Scottish Office Social Research Study, HMSO, 1980, Table 3.4. Our own research in eighteen housing authorities suggests that over the period 1977/78 to 1981/82 the number of actions raised and decrees granted fell slightly and that there was an 18% reduction in the number of evictions carried out. Some housing authorities increased their use of court procedures and evictions while others made less use of these measures.
3. A full report of the research *Public Housing, Rent Arrears and the Sheriff Court : a study of the early implementation and impact of the Tenants' Rights, Etc. (Scotland) Act 1980* is to be published by the Scottish Development Department as a C.R.U. Paper.
4. See Joint SDD/SWSG Circular 2/1974 *Measures to reduce rent arrears*

and prevent evictions and the recommendations in Diana Wilkinson, *op.cit.*, Chapter 8.

5. The ten sheriff courts were chosen to represent the range of sheriff courts in Scotland. They included the courts serving three of the four cities (Aberdeen, Edinburgh and Glasgow), two other courts serving predominantly urban areas in Strathclyde (Airdrie and Paisley), two courts serving large towns and their hinterland (Kirkcaldy and Perth) and three courts serving predominantly rural areas (Arbroath, Lanark and Selkirk). The eighteen housing authorities which raised actions in these courts represented the entire range of Scottish housing authorities in terms of size, urban-rural characteristics and styles of housing management.
6. Housing authorities raising less than 25 actions during February 1982 were sampled continuously from January 1982 until at least 25 cases were obtained; those raising more than 25 but less than 100 actions in February 1982 were continuously sampled until the next highest threshold of 50, 75 or 100 cases was obtained; while housing authorities raising more than 100 actions in February 1982 were sampled using an appropriate sampling ratio until 100 cases were obtained. Thus the minimum number of cases per authority was 25 and the maximum 100.
7. Final court decisions included decrees for recovery of possession, decrees for expenses only, decrees of dismissal, continuations *sine die* (used only in the Airdrie court) and sisted cases, unless we were aware that the case had been recalled during the period of study.
8. The 1978 data are reported in Diana Wilkinson, *op.cit.*
9. It would appear that the granting of continuations *sine die* on the pursuer's motion preceded the passing of the Tenants' Rights Act.
10. See Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 (S.I.476), Rule 18(1).
11. In several of the courts which were normally presided over by a sheriff clerk or a depute (and it may well be the case that it applies to all of them) we were told that defended or otherwise difficult cases (or, in the case of Aberdeen cases where the defender was represented by a solicitor) were routinely referred to the sheriff.
12. A good recent example is the Court of Session's public information leaflet on "do it yourself divorce" which merited a consumer award for

plain writing.

13. *op.cit.*

14. Although there was no apparent relationship, among the eighteen housing authorities in our study, between political control and an authority's approach to rent arrears and evictions, changes in political control may lead to changes in policy. A recent example was the decision of Edinburgh District Council soon after the Labour Party gained control in May 1984 to abandon the use of eviction in cases of rent arrears.

15. Robert Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law : The Case of Divorce", 88 *Yale Law Journal* (1978), pp.950-997. See also Robert Mnookin's article with the same title in 32 *Current Legal Problems* (1979), pp.65-103.

16. See Marc Galanter "Why the 'haves' come out ahead : speculations on the limits of legal change", 9 *Law and Society Review* (1974) pp.95-160. See also Galanter's critique of Mnookin and Kornhauser in Mauro Cappelletti (ed) *Access to Justice in the Welfare State*, Badia Fiesolana, Firenze (Florence) 1981, pp.147-181.

17. A number of housing officials expressed the view that where tenants appeared in person, the courts frequently accepted unsubstantiated claims, gave the tenant the benefit of the doubt and cosseted tenants by giving them longer to pay than they required.

18. In Aberdeen, the Arrears Sub Committee (chaired by the Convener of the Housing Coimmittee and attended by representatives of the Social Work Department) considered all arrears cases, after service of notice of proceedings and, in many cases, before commencement of court action. Most tenants (we were told 80-90%) appeared in person before the sub committee. The sub committee, which sat once a month centrally and once a month in a decentralised area office, investigated the causes of rent arrears, discussed tenants' financial problems, gave advice and tried to negotiate payment of the debt by instalments with tenants.

19. *First Report of the Environment Committee*, HC 40-1, 1982.

20. For an assessment of the sheriff court and its possible strengths in administrative matters, see the *Report of the Grant Committee on the Sheriff Court*, Cmnd 3248, 1967, Part III.